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In the Supreme Court of the United States

OCTOBER TERM 1996

OVERSEAS BULKTANK CORPORATION
and MARITIME OVERSEAS CORPORATION
Petitioners

VERSUS

FRANCHESCA D. ROSE
Respondent

PETITION FOR WRIT OF *CERTIORARI*
TO THE 40TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA

PETITION FOR WRIT OF *CERTIORARI*

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38 pp

QUESTIONS PRESENTED

1. Does Louisiana Code of Civil Procedure Article 1732(6), in violation of the Saving to Suitors Clause contained in 28 U.S.C. §1333(1), and this Court's decision in *Waring v. Clarke*, 46 U.S. (5 How.) 441, 12 L.Ed. 226 (1847), deny defendants in maritime actions their common law remedy of trial by jury, which remedy is preserved to defendants by that clause?

2. Does Article 1732(6) of the Louisiana Code of Civil Procedure, in violation of the Equal Protection Clause, deny only maritime defendants the right to trial by jury?

LIST OF PARTIES

1. Franchesca D. Rose, respondent.

2. Maritime Overseas Corporation, petitioner.*

3. Overseas Bulktank Corporation, petitioner.**

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* Pursuant to Supreme Court Rule 29.6, petitioner Maritime Overseas Corporation states that it has no parent or non-wholly owned subsidiaries.

** Pursuant to Supreme Court Rule 29.6, petitioner Overseas Bulktank Corporation states that it is part of a group of companies comprising the Overseas Shipholding Group, Inc, 114 Avenue of the Americas, New York, New York 10036.

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DECISIONS BELOW

The judgment and reasons for judgment of the 40th Judicial District Court for the Parish of St. John the Baptist, State of Louisiana, dated September 19, 1996, are unreported. The judgment and the reasons for judgment are reproduced in Appendix A. On October 25, 1996, the Louisiana Court of Appeal for the Fifth Circuit denied petitioners' application for supervisory writ. That decision is unreported and is reproduced in Appendix B.

On January 6, 1997, the Supreme Court of Louisiana denied petitioners' application for supervisory writ. That decision is reported at 685 So.2d 115 and is reproduced in Appendix C.

JURISDICTION

On September 19, 1996, the 40th Judicial District Court for the Parish of St. John the Baptist entered judgment from which Overseas Bulktank Corporation and Maritime Overseas Corporation seek review. On October 25, 1996, the Louisiana Fifth Circuit denied petitioners' application for supervisory writ.

Overseas Bulktank and Maritime Overseas timely filed their application for supervisory writ with the Louisiana Supreme Court, which was denied January 6, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1257 and Supreme Court Rule 10(c).

Petitioners have served three copies of this petition on the Attorney General for the State of Louisiana as required by Supreme Court Rule 29.4(c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions of the United States are involved in this petition:

28 U.S.C. § 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

U.S. CONST. art. VI:

. . .

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

. . .

U.S. CONST. amend. XIV:

Section 1. All persons born or natauralized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 13, 1995, Franchesca D. Rose filed suit in the 40th Judicial District Court for the Parish of St. John the Baptist, State of Louisiana, seeking to recover damages allegedly resulting from a fall aboard the S/T OVERSEAS ARCTIC on or about November 11, 1993. In Paragraph II of her petition, Rose designated her claim as a general maritime law claim brought in state court pursuant to the "Savings (*sic*) to Suitors Clause" of 28 U.S.C. § 1333. Rose did not demand a trial by jury.

On August 4, 1995, defendants Overseas Bulktank Corporation and Maritime Overseas Corporation filed their exceptions and answer to the petition. In Paragraph XII of the answer, defendants requested a trial by jury on all issues.

On or about May 31, 1996, Rose filed a motion to strike defendants' jury demand. Defendants timely submitted their opposition. The motion to strike jury was argued before the trial court on July 12, 1996, and was granted by judgment signed Septmber 19, 1996. Defendants' notice of intention (to seek writs) was filed on September 27, 1996, and a deadline for the filing of writs of October 18, 1996, was set by the court in its order signed October 1, 1996. Defendants' writ application, filed on October 18, 1996, was denied by

the Louisiana Fifth Circuit Court of Appeal on October 25, 1996. An application for supervisory writ was filed timely with the Louisiana Supreme Court and was denied on January 6, 1997.

REASONS FOR GRANTING THE WRIT

Overseas Bulktank Corporation and Maritime Overseas Corporation are well aware the Louisiana Supreme Court has ruled specifically that Louisiana Code of Civil Procedure Article 1732(6) is constitutional under both the Louisiana Constitution of 1974 and the United States Constitution, and that this Court denied a petition for a writ of *certiorari* in that case. *Parker v. Rowan Cos., Inc.*, 599 So.2d 296 (La.), *cert.denied*, 506 U.S. 871, 113 S.Ct. 203 (1992). However, Overseas Bulktank Corporation and Maritime Overseas Corporation do not believe the precise arguments set forth in this petition ever have been addressed fully, and specifically, were not addressed by the *Parker* court, notwithstanding that the *Parker* court noted a Supremacy Clause challenge (more accurately described in that case as a "reverse-*Erie*" argument) to the constitutionality of Louisiana Code of Civil Procedure Article 1732(6). Petitioners submit that, although courts have addressed certain Supremacy Clause and Equal Protection challenges made with respect to Article 1732(6), the precise arguments advanced herein have not been addressed prior to being urged in the instant litigation. Moreover, there appears to be a tendency by Louisiana courts to cite *Parker* as blanketly controlling the issue of constitutional challenges to Article 1732(6), without addressing whether a particular Supremacy Clause or Equal Protection challenge, such as urged here, has been considered previously.

While the detailed discourse on the history of the Saving to Suitors Clause necessary to understand fully how it impacts this issue is set forth below, petitioners summarize their Supremacy Clause argument to illustrate that no fallacy in this argument has been specified or expressed by any court confronted with this particular challenge to the constitutionality of Article 1732(6).

Petitioners submit that the common law remedy saved by the Saving to Suitors Clause is saved to defendants, as well as to plaintiffs. *Waring v. Clarke,* 46 U.S. (5 How.) 441, 12 L.Ed. 226 (1847). The right to a trial by jury is part of the remedy which is saved. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780 (1962). It logically follows (and the Supremacy Clause demands) that, when a plaintiff brings an admiralty or general maritime law claim in state court pursuant to the Saving to Suitors Clause, the claim is subject to all aspects (remedies) of the Saving to Suitors Clause, including the defendant's right to a trial by jury. In fact, the Louisiana Supreme Court recognized that a claim under the Jones Act, 46 U.S.C. §688, may be brought in state court only because of the Saving to Suitors Clause. In doing so, the *Parker* court noted this Court previously held that Jones Act rights:

> may be asserted and enforced either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury.

Parker, 599 So.2d at 301 (citing *Panama Railroad Co. v. Vasquez,* 271 U.S. 557, 560, 46 S.Ct. 596, 597 (1926)).

A Jones Act claim may be brought in state court, since state courts administer common law remedies. State courts are not admiralty courts administering admiralty remedies. As set forth above and in much greater detail below, the common law remedy saved under the Saving to Suitors Clause is saved to both plaintiffs and defendants and includes the right of each party to a trial by jury. As Article 1732(6) strips this right from maritime defendants, it violates the Supremacy Clause and must be declared unconstitutional.

Article 1732(6) cannot survive even minimum scrutiny with respect to Equal Protection, as there is no rational justification to single out maritime defendants alone as undeserving of the right to trial by jury in state court. Accordingly, Article 1732(6) is null and void, and petitioners must be afforded their right to a trial by jury.

I. HISTORICAL BACKGROUND OF THE SAVING TO SUITORS CLAUSE

On June 21, 1788, the Constitution became effective among the nine colonies which had ratified it. The Constitution ensured the rights the colonists enjoyed under the common law of England would be maintained in the new nation. *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 29-30, 111 S.Ct. 1032, 1049-50 (1991) (Scalia, J., concurring) (tracing the history of the notion of due process of law). In March 1789, the first Congress convened and proposed the Bill of Rights for ratification by the States.

Later that same session, Congress enacted the Judiciary Act of 1789, Section 9 of that Act granted the federal district courts "exclusive original cognizance of all civil causes of

admiralty or maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The Judiciary Act of 1789, §9. Section 9 was the precursor to 28 U.S.C. §1333(1).

This Court interpreted Section 9 in *Waring v. Clarke,* 46 U.S. (5 How.) 441, 12 L.Ed. 226 (1847), as saving to maritime defendants the remedies available under the common law:

> In respect to the clause in the ninth section of the Judiciary Act, — "saving and reserving to suitors in all cases a common law remedy where the common law is competent to give it," — we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. *The saving is for the benefit of suitors, plaintiff and defendant,* when the plaintiff in a case of concurrent jurisdiction chooses to sue in the common law courts, so giving to himself *and the defendant* all the advantages which such tribunals can give to suitors in them.

Id. 460-61 (emphasis added). Thus, while admiralty and law courts may have concurrent jurisdiction over *in personam* maritime claims, when a suit is brought before a common law court, the common law remedy is saved to suitors — plaintiff and defendant. As will be discussed, the most significant, indeed hallowed, aspect of the common law remedy is the right to trial by jury.

On December 15, 1971, the Bill of Rights became effective. The Seventh Amendment preserved the right to trial

by jury in civil actions in excess of $20.00. U.S. CONST. amend. VII.

II. ARTICLE 1732(6) VIOLATES 28 U.S.C. §1333(1), AND THUS THE SUPREMACY CLAUSE OF THE U. S. CONSTITUTION

In *Parker v. Rowan Cos., Inc.*, 599 So.2d 296 (La.), *cert. denied*, 506 U.S. 871, 113 S.Ct. 203 (1992), the Louisiana Supreme Court concluded Article 1732(6) reserved the right of election of a jury trial only to Jones Act or general maritime plaintiffs, foreclosing any election by defendants. Rowan had contended, in part, that such an interpretation violated the Seventh Amendment to the U.S. Constitution, the Supremacy Clause, and 28 U.S.C §1333. The *Parker* Court concluded the Seventh Amendment was not incorporated into the Fourteenth Amendment to the United States Constitution, so that the several states could deny the right to trial by jury, in general, without offending federal due process of law. *Parker*, 599 So.2d at 301. Answering Rowan's Supremacy Clause challenge, which was more accurately described as a "reverse-*Erie*" argument, the Louisiana Supreme Court opined that the right to a jury trial is "remedial" (*i.e.*, part of the remedy), and not a substantive right afforded by the general maritime law which the states would be compelled to apply, pursuant to the Supremacy Clause. *Parker*, 599 So.2d at 301-02 (quoting *Lavergne v. Western Casualty Co. of N. Amer., Inc.*, 371 So.2d 807, 810 (La. 1979)). The *Parker* opinion does not address Rowan's argument concerning a violation of 28 U.S.C. §1333.

Petitioners do not contend the Seventh Amendment voids Article 1732(6). Further, petitioners do not dispute the

Parker court's conclusion that the right to a trial by jury is not a substantive right of the general maritime law so as to be preserved by the Supremacy Clause.

Petitioners do take issue with the belief that Parker disposes of any and all Supremacy Clause arguments. Petitioners' argument in the instant case, which was not mentioned in *Parker*, is that the denial of trial by jury contravenes a common law remedy saved to suitors under 28 U.S.C. §1333(1), and for that reason violates the Supremacy Clause — not that it displaces a substantive right afforded by the general maritime law. Simply put, the *Parker* court did not consider the challenge petitioners urge here.

Congress' grant of jurisdiction to the states over maritime cases required preservation of a common law remedy. Petitioners respectfully submit this Honorable Court has in binding precedent concluded that the right to trial by jury is a common law remedy saved by the Saving to Suitors Clause. *Waring v. Clarke,* 46 U.S. (5. How.) at 460-61. Petitioners submit state courts are required by the Supremacy Clause to provide this remedy. When a state court has jurisdiction over a matter solely by virtue of 28 U.S.C. §1331(1), denying a party a common law remedy saved to that party violates the Supremacy Clause.

As set forth above, a Jones Act claim could not be brought in state court, absent the Saving to Suitors Clause. *Panama R.R. Co.,* 271 U.S. at 560, 46 S.Ct. at 597. Article 1732(6) of the Louisiana Code of Civil Procedure allows a Jones Act plaintiff, who must use the Saving to Suitors Clause to obtain a state court forum, to deprive a defendant of its right (to a common law remedy) under the Saving to

Suitors Clause. This violates the Supremcy Clause. This particular Supremacy Clause challenge was not made or addressed in *Parker*.

In 1789, a plaintiff could conceivably file an action in one of three court systems — common law ("at law"), admiralty, and equity. As one commentator stated concerning trials at law:

> The right of trial by jury is of ancient origin. To Blackstone it was "the glory of the English law" and "the most transcendent privilege which any subject can enjoy." In Justice Story's view "the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

9 *C. Wright & A. Miller,* FEDERAL PRAC. & PROC.: CIVIL §2301 (2d ed. 1994).

Admiralty courts were not courts of law, and hence, historically, jury trials were not required in those courts. *Waring v. Clarke,* 46 U.S. (5 How.) 441, 460, 12 L.Ed. 226 (1847).

Traditionally, maritime claimants could elect between proceeding in an admiralty court, in which there was no right to trial by jury, or proceeding in a court at law, in which there was a right to trial by jury. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 359-360, 82 S.Ct. 780, 783-784 (1962); *Wilmington Trust v. United States Dist. Ct. for D. Haw,* 934 F.2d 1026, 1029 (9th Cir. 1991). The promulgation of Rule 9(h) of the Federal Rules of Civil Procedure preserved this election after the merger of admiralty pro-

cedure with law and equity procedure in 1966.

The Advisory Committee for the 1966 amendments to the Federal Rules stated:

> Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a non-maritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. §1333) or by equivalent statutory provisions.

FED. R. CIV. P. 9(h) 1966 Advisory Committee's note. Thus, in modern practice a party elects to proceed in admiralty (a Rule 9(h) election) — in a United States District Court — or to proceed at law under the Saving to Suitors Clause, either in a state court or in a federal court. Moreover, "One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute." FED. R. CIV. P. 9(h), 1966 Advisory Committee's note (emphasis added).

The salient issue then is identifying the fountainhead of either party's right to a jury trial in a civil action. If Congress intended to preserve to either party a jury trial by enacting the Saving to Suitors Clause in 1789, then, whether the case is filed in federal court or in state court under 28 U.S.C. §1333(1), either party may demand a jury trial. Petitions suggest this clearly is what Congress intended.

During its first session, Congress proposed the Bill of Rights and enacted the Judiciary Act of 1789. The Seventh Amendment specifically "preserved" the right to trial by jury in suits at common law. The Seventh Amendment did not create the right, it merely preserved an acknowledged right. U.S. CONST. amend. VII.

That same Congress enacted the Saving to Suitors Clause, which preserved to admiralty suitors remedies then available at common law, primarily the remedy of trial by jury. The purpose of the Saving to Suitors Clause was not to ensure a state court forum, but rather to ensure a common law remedy in either a federal court or a state court. *THE MOSES TAYLOR,* 71 U.S. (4 Wall.) 411, 431, 18 L.Ed. 397 (1886). "It is not a remedy in the common law courts which is saved, but a common law remedy." *Poirrier v. Nicklos Drilling Co.,* 648 F.2d 1063, 1065 (5th Cir. 1981). This Court has held the remedy is saved to plaintiffs and to defendants. *Waring,* 46 U.S. at 460-61.

In describing the right to a jury trial in a case brought under the Saving to Suitors Clause (over which the federal court derived its jurisdiction on the basis of diversity of citizenship) this Court stated:

> Congress since 1789, in giving Federal District Courts original jurisdiction of civil case in admiralty, has saved "to suitors in all cases all other remedies to which they are otherwise entitled."

* * *

> This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act and under the Federal Employer's Liability Act *trial by jury is part of the remedy.*

Atlantic and Gulf Stevedores, 369 U.S. at 360, 82 S.Ct. at 784 (emphasis added, citiations omitted).

The holding of the Court in *Atlantic and Gulf Stevedores* supports two conclusions: (1) "trial by jury is part of the remedy" because of the Seventh Amendment, and/or (2) "trial by jury is part of the remedy" because of the Saving to Suitors Clause. The first conclusion obviously is correct. Moreover, it follows that the second conclusion is correct as well.

The right of either plaintiff or defendant to trial by jury is "part of the remedy" in a federal court action because the Seventh Amendment, by its terms, "preserved" the right of trial by jury — it did not create it. The right to trial by jury is "part of the remedy" in cases brought in state court pursuant to "saving to suitors," because the Saving to Suitors Clause, by its terms, "saves" (syn: preserves) a common law remedy, the most significant aspect of which is the right to a jury trial. *See Atlantic and Gulf Stevedores,* 369 U.S. 355, 82 S.Ct. 780. Therefore, the right of trial by jury was "part of the remedy" under the Seventh Amendment, as well as under the Saving to Suitors Clause, as the common law remedy was well understood by the same Congress which deliberated upon both the Seventh Amendment and the Saving to Suitors Clause.

Interestingly, before the passage of Article 1732(6), the

Louisiana Supreme Court concluded (correctly) "a right to a trial by jury is one of the remedies to which a suitor is otherwise entitled pursuant to 28 U.S.C. §1333 when an *in personam* suit based on the general maritime law is brought in our state court." *Lavergne,* 371 So.2d at 810.

Petitioners feel compelled to mention that, in a decision addressing the removal of a Jones Act claim, the U.S. Fifth Circuit, with special emphasis on the 1948 amendment to 28 U.S.C. §1333(1), wrongly concluded, "In view of the revised wording of the "Saving to Suitors' clause and Supreme Court authority, a jury trial is not a required element of a 'Saving to Suitors' remedy." *Linton v. Great Lakes Dredge & Dock Co.,* 964 F.2d 1480, 1491 (5th Cir. 1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 467 (1992).

The logic of the *Linton* opinion is flawed in several respects. First, the Fifth Circuit concluded: "Thus, the Jones Act plaintiff can effect a non-jury trial in federal court either (1) by electing to sue in admiralty, or (2) by grounding his suit on federal question, *i.e.* the Jones Act, and not requesting a jury." *Linton,* 964 F.2d at 1490. The Fifth Circuit is correct with respect to the first "election." The plaintiff can elect a non-jury trial in federal court by proceeding in admiralty. This was the understanding of the drafters of the Constitution as well as of the first Congress.

However, the court's second proposition is wrong. If plaintiff pursues his claim on the law side in federal court based on federal question jurisdiction, the Seventh Amendment is triggered, and either party is entitled to request a trial by jury. FED. R. CIV. P. 9(h) 1966 Advisory Committee's notes.

The Fifth Circuit suggested the *revised wording* of the Saving to Suitors clause indicates trial by jury is not an element of the Saving to Suitors remedy. This reasoning clearly is flawed, as the Redactor's Notes to the 1948 Act state "... the substituted language is simpler and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." 28 U.S.C. §1333 HISTORICAL AND STATUTORY NOTES (emphasis supplied) As the purpose of the language change was to make the clause "more expressive of the original intent of Congress," one cannot conclude properly that the revision of the clause somehow removes the right to a jury trial as an element of the common law remedy, or that the original intent of Congress somehow has changed.

The 1948 Act did replace the word "suitors" in the Saving to Suitors Clause, with the phrase "libellant or petitioner." This revision lasted only one year, as the 1949 Act returned the Saving to Suitors Clause to its previous state. "This section amends section 1333(1) of Title 28 U.S.C., by substituting 'suitors' for 'libellant or petitioner' to conform to the language of the law in existence at the time of the enactment of the revision of Title 28. Senate Report No. 303 and House Report No. 352, see 1949 U.S. CODE CONG. SERVICE, p. 1248." 28 U.S.C. §1333 HISTORICAL AND STATUTORY NOTES.

By allowing only plaintiffs to assert the right to a jury trial in state court actions brought under the Saving to Suitors Clause, Article 1732(6) unconstitutionally infringes on the rights conferred on defendants by the Saving to Suitors Clause. Under the jurisprudence of this Court, a defendant

clearly is a "suitor" afforded a remedy by that clause. *Waring*, 46 U.S. at 460-61. The Supremacy Clause prohibits states from infringing on rights granted to parties by the Constitution and the laws of the United States. U.S. CONST. art. VI.

III. ARTICLE 1732(6) DENIES PETITIONERS AND OTHER DEFENDANTS IN MARITIME ACTIONS EQUAL PROTECTION OF THE LAW.

Petitioners submit that Article 1732(6) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1.

Article 1732(6) denies maritime defendants equal protection guaranteed by the United States Constitution. The first relevant inquiry considering this issue is the scope of the statutory classification. Because Article 1732(6) does not classify based on a "suspect class" or violate a "fundamental right," it can survive if it has a rational basis to a legitimate government function. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 2332 (1992).

Article 1731 of the Louisiana Code of Civil Procedure recognizes the right to trial by jury, depending upon the nature and amount of the principal demand. LA. CODE CIV. PROC. ANN. art. 1731. A defendant to a civil tort suit has the option of requesting trial by jury, in the event the plaintiff does not request a jury, if the amount of the claim exceeds $50,000.00. *See* LA. CODE CIV. PROC. ANN. art. 1732(1). Article 1732(6) of the Louisiana Code of Civil Pro-

cedure denies maritime defendants the right to trial by jury in a suit on an admiralty and maritime claim under federal law, brought in state court under the Saving to Suitors Clause, if the plaintiff designates the suit as an admiralty and maritime claim. *Parker,* 599 So.2d 296. Thus, Article 1732(6) distinguishes the rights of tort defendants based solely on whether plaintiff designates the suit as an admiralty and maritime claim.

There is no rational basis to allow the option of a jury trial in state court to be solely that of maritime plaintiffs. Article 1732(6) clearly discriminates against defendants engaged in maritime commerce. The historical practice in federal court, when the basis of the action is maritime, of allowing the plaintiff to elect to proceed in admiralty, without a jury trial, is not a rational basis for a state at the present time to deprive a maritime defendant of a jury trial, where that right was once available to maritime defendants, and remains available to similarly situated non-maritme defendants.

Historically, jury trials were not available in admiralty. This was the case prior to the ratification of the Constitution and continued to be the case following its ratification, as prior distinctions between actions in admiralty and actions at law were preserved in the Constitution.

There is no rational reason for even this discrimination in federal court; rather, the distinction exists only because of its historical context, and it certainly could not be created today. The right to jury trials cannot be "taken" away from classes of defendants without a constitutional amendment. Article 1732(6) did not exist at the time of the

ratification of the U.S. Constitution. It is not the result of an historical differentiation between admiralty courts and courts at law or in equity which existed at the time the U.S. Constitution was drafted. The U.S. Constitution prohibits the establishment of state admiralty courts in Louisiana or in any other state. U.S. CONST. art. III; 28 U.S.C. §1333(1).

Article 1732(6) is an enactment of the Louisiana legislature without any rational basis. It cannot use for its basis the historical context which pertains to the grant of general maritime jurisdiction to U.S. District Courts in the United States Constitution. Petitioners can suggest no rational basis for allowing the State of Louisiana to discriminate against maritime defendants.

It seems clear the Louisiana First and Fifth Circuit Courts of Appeal wrongly have concluded Article 1732(6) passes constitutional muster under the Equal Protection Clause. *Sons v. Inland Marine Serv., Inc.*, 577 So.2d 225, 229-30 (La. App. 1st Cir. 1991); *Youn v. Maritime Overseas Corp.*, 606 So.2d 187, 195 (La. App. 5th Cir. 1992). *Youn* cites *Sons*, which concluded Louisiana had two "legitimate interests" in enacting Article 1732(6): first, to make the state court procedure consistent with admiralty procedure and, second, to minimize the delays and greater court costs associated with jury trials. *Sons*, 577 So.2d at 229-30; *Youn*, 605 So.2d at 195.

Petitioners have demonstrated above that the goal of making Louisiana procedure consistent with admiralty procedure properly cannot be cited as a legitimate basis for the discrimination against maritime defendants in Louisiana courts. Petitioners further submit that minimizing court costs

is an illusory basis on which to classify Louisiana tort defendants. Articles 1733, 1734 and 1734.1 of the Louisiana Code of Civil Procedure, as well as Title 13 of the Louisiana Revised Statutes, require the party demanding a trial by jury to post a bond to cover all costs related to trial by jury. *See* LA. CODE CIV. PROC. ANN. arts. 1733(A) and 1734(A). If the bond or other security is not filed, trial by jury is waived. LA. CODE CIV. PROC. ANN. art. 1734.1(A).

Without the proscription of Article 1732(6), a defendant which demanded a jury trial in a maritime case would have to post a bond to cover those costs attendant with its choice of a jury. Petitoners respectfully submit the Louisiana First and Fifth Circuits erred in concluding Article 1732(6) reduces the costs of a jury trial, since those costs by law will be borne solely by the defendant requesting trial by jury. "After requesting the jury. . . [the defendant] shall be responsible for its cost." *Pritchett v. Martin,* 612 So.2d 290, 293 (La. App. 5th Cir. 1992) (name of party omitted) (rejecting a defendant's argument that it should not be responsible for the cost of the jury since it prevailed at trial).

Assuming *arguendo* bench trials may be less time consuming than jury trials, there is no evidence that maritime trials (bench or jury) are more costly and time consuming than trials of land-based claims (bench or jury). The grounds cited by the Louisiana First and Fifth Circuits as legitimate interests furthered by Article 1732(6) clearly do not justify discrimination against maritime defendants. Would anyone contest an equal protection challenge to Article 1732(6) if it denied the right to trial by jury to those defendants whose names begin with the letters "A" through "L," but allowed trial by jury to those defendants whose names begin with

"M" through "Z"? As arbitrary and capricious as it is, such a practice would without a doubt save money, if the premise that judge trials are faster and less costly than jury trials is correct. The State, as far as petitioners are aware, has conducted no studies to support a cost savings argument.

Just as cost savings would not support discriminating against defendants whose names begin with "A" through "L" (not a suspect class), cost savings cannot support discriminating against defendants in a single industry. The effect of Article 1732(6) is discrimination against maritime defendants without any rational basis.

In fact, if one accepts the premise that jury trials in general — and maritime jury trials in particular — are more expensive and time consuming, notwithstanding the requirement that the party seeking the jury must post a bond for the cost of the jury, it would seem a proper economical move for Louisiana to eliminate jury trials altogether. It makes no sense to penalize only the defendants in admiralty and maritime cases for the alleged increased cost and time involved in a jury trial and yet allow a jury trial at the whim of the plaintiff or a non-maritime defendant.

Petitioners submit Article 1732(6) clearly violates the Equal Protection Clause. It is clear Article 1732(6) does not further the interest of reduction of costs on any equitable basis.

CONCLUSION

As set forth above, petitioners submit Article 1732(6) violates the Supremacy Clause by depriving maritime defendants of their right to the common law remedy of trial by jury, which remedy is saved to them by the Saving to Suitors Clause. Petitioners stress that this is not the same Supremacy Clause challenge as was made in *Parker*, and that this Supremacy Clause challenge had yet to be addressed by the courts of Louisiana before being raised in this lawsuit. This Court has concluded that the remedies saved under the Saving to Suitors Clause are saved to plaintiffs and to defendants, *Waring, supra*, and that trial by jury is part of the remedy saved. *Atlantic and Gulf Stevedores, supra.* Article 1732(6) allows plaintiffs to use the Saving to Suitors clause to bring their maritime claims in state courts, but denies maritime defendants their right to the common law remedy of trial by jury. As such Article 1732(6) must be struck down.

Likewise, Article 1732(6) violates the Equal Protection Clause. The distinction in federal court and federal procedure between admiralty actions and actions at law exists today only because of the historical distinction, incorporated in the Constitution, between the two actions. it is not proper now to create such a distinction in state courts. Similarly, while jury trial may be more costly and time consuming than bench trials, there is no evidence that martime matters are more costly or time consuming than non-maritime matters. There is no reason to economize at the expense of the rights of maritime defendants. There is no reason to discriminate against only defendants and against only defendants in this

particular industry. Article 1732(6) should be declared unconstitutional on these grounds as well.

* * *

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APPENDIX A

FORTIETH JUDICIAL DISTRICT COURT

PARISH OF ST. JOHN THE BAPTIST

STATE OF LOUISIANA

FRANCHESCA D. ROSE

VERSUS

OVERSEAS BULKTANK CORPORTION
AND MARITIME CORPORATION

FILED
96 SEP 19

NUMBER: 34029 DIVISION "A"

FILED: _____ /s/ Joan C. Bourgeois
DEPUTY CLERK

JUDGMENT

This matter came for hearing on the court's regular docket.

PRESENT: Philip J. Boudousque', attorney for plaintiff, Franchesca D.Rose

Gerard T.Gelpi, attorney for defendants, Overseas Bulktank Corporatiion and Maritime Overseas Corporation

Considering the pleadings, arguments and memorandums, and based upon the applicable law:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to Strike Jury is **GRANTED.**

Edgard, Louisiana this 19th day of September, 1996.

/s/ Madeline Jasmine

J U D G E

I hereby certify that the above and foregoing is a true and correct copy of the original on file and of record in my office.

/s/ Joan C. Bourgeois

Dy. Clerk of Court
Parish of St. John the Baptist, LA

REASONS FOR JUDGMENT

After this court signed the jury order filed on behalf of the defendants in this matter, plaintiff, Franchesca D. Rose, filed a Motion to Strike Jury. In plaintiff's Petition for Damages, her claim was identified as a general maritime law claim brought in state court pursuant to the "Savings to Suitors" clause of 28 U.S.C. § 1333. She did not demand a jury trial.

Plaintiff's motion is based on Article 1732 (6) of the Code of Civil Procedure which states:

> "A trial by jury shall not be available in:
> ...(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim."

The law is well settled in this area and the jurisprudence of this state has consistently held that "plaintiff alone has control over whether his admiralty case is to be tried to judge or jury. *Dupre v. Insurance Company of North America* 646 So.2d 461 (App.4 Cir. 1994). Defendant's argument that the article violates constitutional guarantees is without merit. *Usner v. Strobach,* 591 So.2d 713 (App. 1 Cir. 1991) has held "There is no federal or state constitutional right to trial by jury in civil case in state court, this right is provided for by statute. Accordingly, defendant in this action has no right to trial by jury.

Edgard, Louisiana This 19th day of September, 1996.

/s/ Madeline Jasmine

JUDGE

I hereby certify that the above and foregoing is a true and correct copy of the original on file and of record in my office..

/s/ Joan C. Bourgeous

Dy. Clerk of Court
Parish of St. John the Baptist, LA

APPENDIX B

Application For Writs

No. '96 -C- 872

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

Oct 18 1996

/s/ Genevieve Verrette

Dy. Clerk

FRANCHESCA D. ROSE

VERSUS

OVERSEAS BULKTANK CORPORATION
AND MARITIME OVERSEAS CORPORATION

In Re OVERSEAS BULKTANK CORPORATION
AND MARITIME OVERSEAS CORPORATION

Applying for SUPERVISORY WRITS DIRECTED TO THE HONORABLE MADELINE JASMINE, JUDGE, DIVISION "A", FORTIETH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA, NUMBER 34029

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October 5, 1996

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Assistant Attorney General
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PETITION FOR WRITS

DENIED

We cannot say, at this point in the district court proceeding, that the trial judge erred in relying on the applicability of Art. 1732 (6) of the Code of Civil Procedure.

/s/ H.C.G

JUDGE H. CHARLES GAUDIN

/s/ J.L.Cannella

JUDGE JAMES L. CANNELLA

/s/ S.G.

JUDGE SOL GOTHARD

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A TRUE COPY

GRETNA OCT 25 1996,

/s/ Genevieve Verrette, Dy. CLERK

COURT OF APPEAL, FIFTH CIRCUIT

APPENDIX C

THE SUPREME COURT
OF THE STATE OF LOUISIANA

FRANCHESCA D. ROSE

VS. NO. 96-CC- 2818

OVERSEAS BULKTANK CORPORATION AND MARITIME OVERSEAS CORPORATION

IN RE: Overseas Bulktank Corp.; Maritime Overseas Corp.; - Defendant(s); Applying for Supervisory and/or Remedial Writ; Parish of St. John Baptist 40th Judicial District Court Div. "A" Number 34029; to the Court of Appeal, Fifth Circuit, Number 96-CW-0872

January 6, 1997

Denied.

HTL
WFM
CDK
BJJ
JPV
CDT
JTL

CALOGERO, C.J. not on panel

Supreme Court of Louisiana
January 6, 1997
/s/ John T. Olivier

Clerk of Court
For the Court